Supreme Court, U.S.
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No. 94-915

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; AMERICAN INTERNATIONAL GROUP, INC.; and AMERICAN ADJUSTMENT COMPANY, INC.,

Petitioners,

v.

HIGHLANDS INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDIX

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QUESTION PRESENTED

Whether the court of appeals' refusal to remand the case for further proceedings, after determining that the district court mistakenly resolved a dispositive fact issue as a matter of law, coupled with the court of appeals' refusal to review the correctness of the district court's ruling, operated to deprive Petitioners of due process.

PARTIES TO THE PROCEEDINGS BELOW

1. National Union Fire Insurance Company of Pittsburgh, Pennsylvania, Petitioner.

2. American International Group, Inc., Petitioner.

3. American International Adjustment Company, Inc., Petitioner.

4. Highlands Insurance Company, Respondent.

5. The parent company of National Union Fire Insurance Company of Pittsburgh, Pennsylvania, is American International Group, Inc. The non-wholly owned subsidiaries of National Union Fire Insurance Company of Pittsburgh, Pennsylvania, are Asesores Bursatiles Capital Fund N.V., Asesores Bursatiles Venture Fund N.V., Developpement et Finance, American International Specialty Lines Insurance Company, and Lexington Insurance Company.

6. The parent company of American International Group, Inc. is C.V. Starr & Co., Inc. The non-wholly owned subsidiaries of American International Group, Inc. are AIG Financial Products Corporation, General Environment Management Company, Trade Network International, Limited, IPC Holdings, Inc., SELIC Holdings, Inc., American International Life Assurance Company of New York, and AIG Life Insurance Company.

7. The parent company of American International Adjustment Company, Inc., is American International Group, Inc. American International Adjustment Company, Inc. has no non-wholly owned subsidiaries.

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OCTOBER TERM, 1994

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; AMERICAN INTERNATIONAL GROUP, INC.; and AMERICAN ADJUSTMENT COMPANY, INC.,

Petitioners,

v.

HIGHLANDS INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

National Union Fire Insurance Company of Pittsburgh, Pennsylvania, American International Group, Inc., and American Adjustment Company, Inc., respectfully petition that a Writ of

Certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, entered July 21, 1994, is reported at 27 F.3d 1027, and is reprinted in the Appendix hereto as Section A. No separate opinion was entered by the district court.

JURISDICTION

The Judgment of the Court of Appeals was entered on the same date as its opinion (July 21, 1994). The Order of the Court of Appeals denying the Petition for Rehearing was entered on August 19, 1994, and is reprinted in the Appendix as Section B. The Amended Judgment of the United States District Court for the Southern District of Texas, Houston Division, was entered on August 27, 1992, and is reprinted in the Appendix as Section C. The district court also entered an Order concerning its award of attorneys' fees, which is reprinted in the Appendix as Section D. This Petition for Writ of Certiorari was filed within ninety (90) days of the entry of the Order denying the Petition for Rehearing.

Federal subject matter jurisdiction in the district court was predicated on 28 U.S.C. § 1332(a), in that the parties are citizens of different states and the matter in controversy exceeds the sum

or value of $50,000, exclusive of interest and costs. Jurisdiction of this Court to entertain this Petition for Writ of Certiorari is invoked pursuant to 28 U.S.C. § 1254(1). Petitioners contend that the action of the Fifth Circuit Court of Appeals in this case is reviewable pursuant to Rule 10.1(a) of the Rules of this Court, in that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Petitioners contend further that the action of the Court of Appeals violates the due process clause set forth in the Fifth Amendment of the United States Constitution, and that its action is therefore reviewable under Rule 10.1(c) of this Court, in that the Court of Appeals "has decided a federal question in a way that conflicts with the applicable decisions of this Court."

CONSTITUTIONAL PROVISIONS AND STATUTES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor *be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

In Suits at common law, where the value in controversy shall exceed Twenty Dollars ($20.00), *the right of trial by jury shall be preserved*, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

STATEMENT OF THE CASE

1. Course of Proceedings Below.

This is a diversity case in which the plaintiff asserted three state-law causes of action: fraud, negligent misrepresentation and breach of fiduciary duty. It is undisputed that the claims are governed by New York law. The plaintiff below was Highlands Insurance Company ("Highlands"), the issuer of an excess policy of general liability insurance. The defendants were the issuer of the primary policy, National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union"), and two related companies, American International Group, Inc. ("AIG") and American International Adjustment Company, Inc. ("AIAC").[1] The insured under both policies was a general paving contractor, Naclerio Contracting Company, Inc. ("Naclerio"), which was not a party to the litigation.

Highlands filed the lawsuit in July 1990, alleging that the defendants had concealed the existence of a third insurance policy, which would have provided coverage to Naclerio's co-defendant, the City of New York, in a previous personal injury lawsuit. The concealment, it said, had caused Highlands to pay a greater amount in settlement of the previous lawsuit than it otherwise would have

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[1] National Union, AIG and AIAC will be referred to collectively in this Petition as "National Union," in conformance with the terminology employed by the court of appeals, and may occasionally be referred to as "Petitioners."

paid. R. 124. The defendants claimed that they had, in fact, disclosed the existence of the policy to Highlands in a timely manner, and that they did not contribute to the settlement because there was no coverage. R. 185.

At trial, the parties disagreed over whether the OCP policy was in the amount of $500,000 or $3,000,000 on the date of the injury. Tr. 316-20, 573-74. The question was significant because the amount of compensatory damages recoverable in the action necessarily was limited to the amount of the policy. The measure of damages was, by definition, equal to the amount which "would have been paid" under the OCP policy if the alleged concealment had not occurred. R. 357, 360; Tr. 648-49. National Union's trial counsel argued that the issue should be resolved by the court, as a matter of law, contending that the policy was unambiguous. Tr. 474, 483. The district court deferred its ruling until the close of the evidence, and then decided that the question indeed was one of law, for the court. Tr. 650. It instructed the attorneys not to address the point during closing arguments, and instructed the jury not to consider the policy limits during its deliberations. Tr. 651.

The jury found for Highlands, and assessed the amount of compensatory damages at $1,100,000. R. 389. National Union asked that the award be reduced to $500,000, but the trial court failed to rule on its request. R. 415, 542. Its failure had the

effect of a finding that the policy was in the amount of $3,000,000, since that was the only conclusion consistent with a judgment in the amount of $1,100,000. Petitioners argued to the Fifth Circuit that the district court's unarticulated legal conclusion was erroneous, since no rational interpretation of the contract would support a conclusion that the policy was in the amount of $3,000,000. Brief for Appellants at 42; Reply Brief for Appellants at 18; Appellants' Petition for Rehearing at 8-9.

The court of appeals held that the issue was one of fact. App. at A-15; *Highlands Insurance Company v. National Union Fire Insurance Company*, 27 F.3d 1027, 1033-34 (5th Cir. 1994). Because the district court therefore erred in deciding the question as a matter of law, the court of appeals should have remanded the case for further proceedings. Instead, however, it affirmed the judgment, ruling that Petitioners had *waived* the "issue of fact" by not requesting that it be submitted to the jury. App. at A-16; 27 F.3d at 1034 ("A party cannot complain that the fact issue ought to have gone to the jury unless it has requested their (sic) submission to the jury."). Moreover, the court of appeals refused even to consider the correctness of the district court's legal determination of the policy limits, based on its conclusion that the issue was one of fact which had been waived. *Id.*

In their Petition for Rehearing, Petitioners pointed out that the opinions of the district court and the court of appeals were

inconsistent, in a manner which operated to deprive them of meaningful review on the issue of the policy limits:

> The problem is that National Union is being faulted, on appeal, for not submitting a jury question, when it was instructed not to do so at trial. The trial judge ruled that the question was one of law, which she would decide, rejecting Highlands' argument that an ambiguity existed. Tr. 474, 481-83, 487 & 650-51. Had the trial court ruled that there was an ambiguity, National Union could have requested a jury instruction prior to the reading of the charge. National Union was precluded from doing so by the judge's determination that the contract was not ambiguous, only to be told now that the issue was one of fact for the jury, which it has waived. Under such conflicting directions, National Union cannot tell, even now, what it is supposed to have done. The judgment should be reduced to $500,000, or the case remanded, so that National Union is not penalized for arguing successfully to the trial court that the question was one of law.

Petition for Rehearing at 11. The Petition for Rehearing was denied by Order dated August 19, 1994. App. at B-1. Petitioners now seek review by this Court of whether the court of appeals' refusal either to remand the case for further proceedings or to review the district court's construction of the contract deprives them of due process of law, in violation of the Fifth Amendment.

2. Factual Background.

On June 21, 1985, four young men were riding in a jeep on Cross Bay Boulevard in Queens, New York. Tr. 21. Their names were Timothy Gleason (the driver), Robert Steckler, Timothy Sullivan and Paul Murray. Tr. 21-22. They were traveling north in the center lane of three lanes of northbound traffic, when Gleason pulled into the right-hand lane, in an attempt to pass a tractor-trailer truck. Tr. 104, 107, 536.

Along that stretch of Cross Bay Boulevard, Naclerio Contracting Company had been installing sewer basins, pursuant to a construction contract between Naclerio and the City of New York. Tr. 104; Defendants' Exhibit ("Dx") 4a. On this particular day, Naclerio had stacked loose dirt and debris in a pile approximately thirteen feet high in the right-hand lane. Tr. 21, 104. As Gleason pulled around the tractor trailer, into the right-hand lane, the jeep ran into the pile of debris and overturned. Tr. 104. Steckler, Gleason and Sullivan were injured severely in the accident, and Steckler died from his injuries. Tr. 22, 105. In early 1986, Steckler's estate, Gleason and Sullivan filed suit in Queens County against Naclerio and the City, alleging negligence, failure to warn and "premises liability." Tr. 152; Dx 4a, 4b & 4c.

At the time of the accident, Naclerio was insured against such occurrences under a general liability policy issued by National

Union, having a policy limit of $1,000,000, and under an excess liability policy issued by Highlands, having a policy limit of $5,000,000. Tr. 22-23, 112. Tr. 537. During the litigation, Naclerio's attorneys concluded that Naclerio's liability would exceed the limits of the primary policy. National Union therefore tendered the $1,000,000 policy limits to Highlands, for use in the settlement negotiations. Tr. 120, 498, 545, 562. Highlands' claims supervisor then proceeded to negotiate a settlement of the suit for a total payment of $2,160,000. Tr. 279, 498.

Early in the litigation, National Union and its agents had informed Highlands repeatedly that it (National Union) had issued a one-year Owners' and Contractors' Protective ("OCP") policy to the City of New York on June 7, 1984, which had been renewed by the City for an additional year as of June 7, 1985. Dx 2. The OCP policy had been purchased for the City by Naclerio, pursuant to the terms of the construction contract. Dx 2; Tr. 407, 533. National Union did not tender any settlement amounts under the OCP policy, since it had concluded that the City had no liability which was covered under the OCP policy and, in any event, the City had been indemnified by Naclerio against losses arising out of the project. Tr. 523-24, 526, 539.

The Steckler suit was tried before a jury in April 1989. Dx 5. While the jury was in deliberations, Highlands' claims supervisor, Edward Varosky, agreed to settle the case for a total

payment to the plaintiffs of $2,160,000. Tr. 120. Of that amount, the sum of $60,000 was paid by the insurance company which had issued Gleason's automobile liability policy. Tr. 112, Dx 5. One million dollars was paid by National Union under Naclerio's primary liability policy, and the remainder ($1,100,000) was paid by Highlands, as the excess insurer. Tr. 23, 121. Releases were executed by the plaintiffs, releasing Gleason, Naclerio and the City from further liability, and the Steckler suit was dismissed. Dx 6. Highlands then initiated the present litigation, claiming that National Union should have contributed additional money to the settlement, under the OCP policy. R. 123-24.

REASONS FOR GRANTING THE WRIT

A. The decision of the court of appeals violated the rule of *Saunders v. Shaw*, and thereby deprived Petitioners of due process.

The decision of the court of appeals to render judgment against National Union, instead of remanding the case, violates the rule of this Court announced in *Saunders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638 (1917) (Holmes, J.). As will be demonstrated below, the rule has been reaffirmed by this Court and other federal courts on numerous occasions. In *Saunders*, the petitioner complained that he had relied on a ruling of the trial court in deciding not to introduce certain evidence at trial, only to be faulted by the appellate court for the absence of proof. The inconsistent positions of the two courts, he claimed, placed him in a bind which was fundamentally unfair, and for which he had no adequate remedy in the absence of certiorari. This Court agreed, and granted the writ.

The *Saunders* case started out in Louisiana state court.[2] During the trial of a suit to enjoin the collection of a property tax, the plaintiff offered evidence to show that the tax did not benefit his property, and therefore should not be assessed against his property. The trial court excluded the evidence as being "inadmissible under the pleadings." 244 U.S. at 319, 37 S. Ct. at 639. The defendant therefore offered no evidence that the land in question *would* benefit from the tax. On appeal from a judgment for the defendant, the Louisiana Supreme Court decided that the land could not possibly have benefitted from the tax, and therefore that the collection of the tax was improper. *Id.*

It is important to note that, until that point in the proceedings, no due process violation had occurred. However, when the Louisiana Supreme Court then *rendered* judgment for the plaintiff, and enjoined collection of the tax -- instead of remanding the case for further proceedings consistent with its correction of the district court's ruling -- it placed the defendant/petitioner in an impossible bind. Essentially, it faulted the defendant for the mistake of the trial court. The defendant had urged the trial court

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[2] While the *Saunders* decision itself concerned an appeal from the state court system, it is clear that the *Saunders* rule also applies to due process analysis under the Fifth Amendment. *See, e.g., Helis v. Ward*, 308 U.S. 365, 60 S. Ct. 283, 284 (1939) (granting certiorari to construe the application of the *Saunders* rule in an appeal from the Fifth Circuit Court of Appeals); *Hamling v. United States*, 418 U.S. 110, 94 S. Ct. 2887 (1974) (in which the majority finds the *Saunders* rule inapposite, while the dissent argues for its application, in an appeal from the Ninth Circuit).

to rule as it did and, having prevailed on that point, he was not required to take action which would have been inconsistent with his theory of the case: "[W]hen the trial court ruled that it was not open to the plaintiff to show that his land was not benefitted, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view." 244 U.S. at 319, 37 S. Ct. at 639. To the contrary, the defendant was entitled to rely on the trial court's ruling in fashioning and presenting his defense. The trial court had taken the issue away from the jury, at his request, and he was not required to engage in an inconsistent attempt to create an issue of fact. *Id.*

This Court also held that the defendant's assertion of the error in his petition for writ of certiorari was timely, since the error did not occur until the last stage of the appeal below. "[I]t would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask for a ruling or to take other precautions in advance." *Id.* at 320, 37 S. Ct. at 640.

In the present case, the court of appeals faulted the defendant, National Union, for not submitting an issue to the jury as to the proper construction of the contract in question, even

though the district court had taken the issue away from the jury prior to the reading of the charge. Because National Union did not tender a jury question, it said, the issue was waived:

> National Union did not ask for an instruction on this defense, waiving its right to complain that the jury was not guided on it. We will not now let National Union complain that the judge accepted the jury's verdict, when the jury could not have considered the argument with which National Union now attacks the verdict. Nor can National Union complain that the judge denied it a jury trial on this factual issue, because it had already waived that right. A judge is presumed to have made all fact findings necessary in favor of its judgment entered or a Rule 49 verdict. A party cannot complain that the fact issue ought to have gone to the jury unless it has requested their submission to the jury.

App. at A-16; 27 F.3d at 1034. The court of appeals ignored the fact that the trial judge *instructed* the parties that the question was one of law, to be decided by the court, *prior to* the submission of the charge to the jury. Indeed, the trial judge forbade the parties from arguing the issue to the jury, and then instructed the jury that "the policy limits were something that I was to determine, not something for you to determine." Tr. 650-51. Petitioners' trial counsel pointed out to the court *at the time* that the jury needed to know the amount of the policy limits in order to apply correctly the judge's instructions concerning the measure of damages, should it reach the damages issue. R. 360; Tr. 648. The trial judge,

nevertheless, refused to provide the results of her decision to the jury prior to its deliberations. Instead, she continued to defer her own ruling:

> I'm not prepared to construe the contract at this point. I can't possibly do that at this point. I don't know what to do. I'm in kind of in a quandary here. . . . Let's go with your not arguing that; and, depending on what the jury does, after I have looked at the contract, I may have to grant a new trial.

Tr. 649-50. Despite her promise to resolve the issue as a matter of law, the judge made no such ruling. Instead, she simply entered judgment in the amount of the verdict. R. 467. Petitioners repeatedly requested an express determination of the policy limits in their post-trial motions, but the judge ignored the requests. R. 415-452.

Because the trial judge refused to make an express finding, it must be presumed that she found the limits to be in the amount of $3,000,000, since that is the only conclusion which would allow a judgment to be entered in the amount of $1,100,000. Therefore, on appeal, Petitioners argued to the Fifth Circuit that the trial court decided the issue wrongly, as a matter of law. Appellants' Brief at 42; Reply Brief for Appellants at 18. The court of appeals refused to review the trial court's determination, however, on the unanticipated ground that the question was one of fact, which had been waived by failure to submit it to the jury. App. at A-16.

This is precisely the sort of bind which the *Saunders* rule forbids. *See, e.g., Helis v. Ward*, 308 U.S. 365, 369, 60 S. Ct. 283, 284 (1939) (acknowledging that "the failure to remand for a new trial" as to "matters which were immaterial to the issues" until the time of the appellate court's ruling may violate "the rule of *Saunders v. Shaw*"); *Butler Bros. v. McColgan*, 315 U.S. 501, 510, 62 S. Ct. 701, 705 (1942) (noting that a litigant may be "denied procedural due process under the rule of *Saunders v. Shaw*" where an appellate court's "innovation" operates as a "surprise," depriving the party of "a full opportunity to be heard"); *Hamling v. United States*, 418 U.S. 87, 149, 94 S. Ct. 2887, 2923 (1974) (Brennan, J., dissenting) (characterizing the *Saunders* rule as establishing that it is a violation of due process for the appellate court "to reverse a case and render judgment absolute . . . upon a proposition of fact that was ruled to be immaterial at the trial").[3]

In the present case, if the question was one of fact, then the court of appeals' refusal to remand the case deprived Petitioners of due process of law, both by subjecting them to conflicting rulings in a manner which precluded a full opportunity

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[3] The Sanders rule is also discussed in *Georgia Railway & Electric Company v. City of Decatur*, 295 U.S. 175, 171, 55 S. Ct. 701, 703 (1935) (the refusal of a court to receive evidence on a material issue may violate due process), and *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 128, 54 S. Ct. 330, 340 (1934) ("the deprivation of the right to present evidence bearing on the issue (has) been adjudged to deny due process" under the rule of Saunders).

to be heard, and by depriving them of their right to trial by jury of all material issues of fact. If the question was one of law, then the court of appeals' refusal to review the district court's determination of the issue deprived Petitioners of due process, by depriving them of the right to meaningful appellate review.

Similar principles have been recognized by this Court in other cases. For example, in *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781 (1982), it was held as follows: "When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings. . . . Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." 456 U.S. at 291, 102 S. Ct. at 1791. The Court in *Pullman-Standard* went on to conclude as follows: "All of this is elementary. Yet the court of appeals, after holding that the district court had failed to consider relevant evidence and indicating that the district court might have come to a different conclusion had it considered that evidence, failed to remand for further proceedings." 456 U.S. at 292, 102 S. Ct. at 1792. Accordingly, the judgment of the court of appeals was reversed, and the case was remanded for further proceedings. 456 U.S. at 293, 102 S. Ct. at 1792.

Decisions of other federal courts of appeal are analogous. For example, in *Jackson State Bank v. King*, 992 F.2d 256, 257 (10th Cir. 1993), it was held that a remand is necessary "where a state court announces a new rule of law on certification following a jury trial." In *North Mississippi Communications, Inc. v. Jones*, 951 F.2d 652, 657 (5th Cir. 1992), the Fifth Circuit itself concluded that "[w]hen a trial court has made a fact finding upon an erroneous view of the law, the factual determination loses all vitality, requiring a remand." In *RTC Transportation, Inc. v. Conagra Poultry Co.*, 971 F.2d 368 (9th Cir. 1992), the Ninth Circuit Court of Appeals ordered that "[i]f the district court avoids an issue that, on appellate review, becomes dispositive," the appellate court should decide the issue, if the question is one of law and an appropriate record has been developed, or, if not, should remand it for further proceedings. *Id.* at 375.

In the present case, the record shows that, during the progress of the trial, National Union's counsel repeatedly urged the district court to resolve the policy limits issue as a matter of law, stating expressly that "there is no ambiguity" in the contract and that the only rational conclusion was that the limits were in the amount of $500,000.[4] Tr. 474, 483. The court deferred its

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[4] Under New York law, "[w]hether a contract's terms are ambiguous is a question of law decided by the court. . . . If a contract is unambiguous, courts are required to give effect to the contract as written, and may not consider extrinsic evidence to alter or interpret its meaning. (Citations omitted.) That is,

ruling. Tr. 487. At the conclusion of the evidence, Highlands' counsel *agreed* that the issue was one of law, and the judge announced that she would determine it as such. Tr. 648-51.

Had the trial court ruled that an ambiguity existed, National Union could have requested a jury instruction prior to the reading of the charge. National Union was precluded from doing so by the judge's determination that the contract was not ambiguous, only to be told now that the issue was one of fact for the jury, which it has waived. Under such conflicting directions, National Union cannot tell, even now, what it is supposed to have done. The case should be remanded, so that National Union is not penalized for arguing successfully to the trial court that the question was one of law.

B. The decision of the court of appeals was based on other errors, as well.

Further, the court of appeals' conclusion was based on an erroneous reading of the record. At page 13 of the slip opinion,

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extrinsic evidence may not be used to create an ambiguity in an otherwise unambiguous agreement." *Consarc Corporation v. Marine Midland Bank, N.A.*, 996 F.2d 568, 573 (2d Cir. 1993) (emphasis supplied), citing *Hudson-Port Ewen Associates v. Chien Kuo*, 78 N.Y.2d 944, 573 N.Y.S.2d 637, 578 N.E.2d 435 (1991), and *W.W.W. Associates v. Giancontieri*, 77 N.Y.2d 157, 565 N.Y.S.2d 440, 566 N.E.2d 639 (1990). "This principle applies equally to contracts of insurance." *Scanlon v. Travelers Insurance Company*, 849 F. Supp. 836, 837 (N.D.N.Y. 1994); *accord, Jakobson Shipyard v. Aetna Casualty and Surety Company*, 775 F. Supp. 606, 609 (S.D.N.Y. 1991).

for example, the court stated that National Union "*does not challenge the judge's legal conclusion about the proper interpretation of the contract.*" On that same page, however, the court stated just the opposite: "National Union argues that the judgment should be reduced to $500,000, *because the judge made an error of law in interpreting the contract.*" (!) Moreover, a review of National Union's appellate briefs demonstrates that National Union did, in fact, "challenge the judge's legal conclusion about the proper interpretation of the contract." Among other things, National Union's briefs set forth the following statements and arguments:

> The district court also erred in determining, *as a matter of law*, that the limits of the OCP policy were in the amount of $3,000,000.

Brief for Appellants at 8 (emphasis supplied).

> [T]he amount of the OCP policy limits . . . was resolved by the district court *as a question of law*. Therefore, the standard of review is *de novo*.

Brief for Appellants at 38 (emphasis supplied).

> Because it did not reduce the jury's verdict to $500,000, it might be implied that the court found the OCP policy limits to have been in the amount of $3,000,000. *If so, however, then it erred as a matter of law.*

Brief for Appellants at 42 (emphasis supplied).

> Appellants' position is, and always has been, that the issue is one of contract construction, which *is an issue of law for the court*, where the language of the contract is unambiguous. It is Appellants' position, further, that the language of the contract in this case *is* unambiguous, and therefore that *the issue is one of law.*

Reply Brief for Appellants at 16 (emphasis supplied).

> Under New York law, the construction of an unambiguous contract presents a *question of law*, and even the resolution of an ambiguity is a *legal issue*, where it does not necessitate reference to extrinsic evidence.

Reply Brief for Appellants at 16 n.5 (emphasis supplied).

> At the conclusion of Highlands' evidence, out of the presence of the jury, *Appellants' counsel asked the court to decide the policy limits issue as a matter of law.* Tr. 474, lines 15-20. Highlands' counsel responded that there was "confusion" as to the intent of the parties, and that an unsigned endorsement appeared to renew the primary term after the date of the accident. Tr. 481, line 19; 482, line 13. *Appellants' counsel again asked for resolution of the issue as a matter of law, saying*: "*There is no ambiguity.*" Tr. 483, line 19. The court deferred its ruling. Tr. 487, lines 4-6.

Reply Brief for Appellants at 17 (emphasis supplied).

> On appeal, Appellants have continued to insist that *the question is one of law.*

Reply Brief for Appellants at 18 (emphasis supplied).

> Appellants' argument on appeal is that *the trial court decided the issue wrongly, as a matter of law.*

Reply Brief for Appellants at 18 (emphasis supplied). Indeed, Highlands itself admitted that National Union's position at trial was that the question was one of law:

> At trial, National Union took the position that the amount of policy limits *was a matter of contract construction and a question of law for the Court.*

Appellee's Brief at 32 (emphasis supplied). Therefore, the court of appeals' statement that National Union "does not challenge the judge's legal conclusion about the proper interpretation of the contract" was incorrect. National Union *did* challenge the interpretation of the OCP policy, as a matter of law, just as it had in the trial court. For the court of appeals to refuse to review the determination of that legal issue, based on the supposed failure of National Union to submit a *jury issue*, constitutes a denial of due process.

C. The decision of the court of appeals resulted in harmful error.

Finally, the district court's determination -- which the court of appeals refused to review -- was arbitrary and capricious. There simply is no principle of law which would cause the OCP policy to be in the amount of $3,000,000 on June 21, 1985. By

its own terms, the policy, as renewed by the signed endorsement, was in the amount of $500,000 on that date. The only argument asserted by Highlands to contradict the clear language of the policy and endorsement is that a second, unsigned endorsement was subsequently issued. Dx 10, p. 8. However, the unsigned endorsement offered by Highlands *also was in the amount of $500,000*. Not only that, but the unsigned endorsement offered by Highlands purported only to "renew" the OCP policy *as of July 1, 1985*. Dx 10, p. 8; Brief for Appellants at 39. The unsigned renewal is redundant of the signed renewal, except on terms less favorable to the insured -- it purports only to renew the coverage in the amount of $500,000 (the same as the signed renewal) as of July 1, 1985 (as opposed to June 7, 1985). There is no reasonable rationale whatsoever which reconciles these documents in such a way as to result in coverage in the amount of $3,000,000 on June 21, 1985. Therefore, the trial court erred as a matter of law in finding that coverage existed in the amount of $3,000,000 on the date of the accident, no matter which endorsement it considered or may have considered, or what factors went into its unarticulated decision-making process. If the signed endorsement renewed the policy, then the coverage was in the amount of $500,000; if the unsigned endorsement renewed the policy, then the coverage also was in the amount of $500,000. If neither endorsement renewed the policy, then there was no coverage on

the date of the accident. In any event, it is fundamentally unfair for the trial court, without giving any reasons or making any findings, to hold that a policy which expired by its own terms on June 7, and was not renewed except by an instrument or instruments in the amount of $500,000, was in effect on June 21 in the amount of $3,000,000. The court of appeals' refusal to review the decision therefore constituted harmful error. Accordingly, the court of appeals' refusal to consider the issue should be reversed, and the case should be remanded so that the trial court's decision can be reviewed.

CONCLUSION

If the court of appeals was correct in its conclusion that the issue was one of fact for the jury, then the district court erred in deciding that it was a question of law. In that event, the court of appeals should be instructed to remand the case to the district court so that the issue may be resolved by a jury. If the court of appeals was incorrect, and the question *was* one of law, then the court of appeals' refusal to review the issue was erroneous, and the court of appeals should be instructed to review the trial court's legal determination of the policy limits under the appropriate standard of review. In either event, National Union requests that this Court reverse the decision of the court of appeals that the issue was waived, and asks that the principal amount of the judgment be

reduced to $500,000, or that the consideration of the amount of damages be remanded to the court of appeals or the district court for further proceedings.

WHEREFORE, Petitioners respectfully pray that their Petition for Writ of Certiorari be granted; that this Court reverse the decision of the court of appeals; that this Court reduce the principal amount of the judgment to $500,000 or, in the alternative, that this Court remand the case to the lower courts for further proceedings; and that Petitioners be awarded such other and further relief to which they may justly be entitled.

Respectfully submitted,

COWLES & THOMPSON, P.C.

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ATTORNEYS FOR PETITIONERS

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 92-2933

HIGHLANDS INSURANCE COMPANY,

Plaintiff-Appellee,

versus

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, ET AL.,

Defendant-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before GOLDBERG, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

This is an appeal from a judgment in favor of an excess insurance carrier and against the primary carrier for failure to disclose the full extent of its primary coverage for an automobile accident. Victims of a car accident sued a construction company and the City of New York. National Union carried the primary

coverage for both defendants. Highlands, the excess carrier for the construction company, contributed $1,100,000 to a settlement. Highlands later sued National Union and two of its affiliated agents, claiming that not disclosing that National Union insured the City led Highlands to contribute too much to the settlement. The trial court found the defendants liable under New York law and entered judgment for Highlands. We hold that New York law does not support the trial court's award of attorney fees for common law fraud. We affirm the judgment in all other respects.

I.

In 1985, a Jeep carrying four young men collided with construction debris left on a New York City bridge by Naclerio Contracting Company. Two of the men suffered severe injuries and a third died. The two men and the estate of the third sued Naclerio and the City of New York for damages in early 1986.

Naclerio was insured by a general liability policy issued by National Union, with a policy limit of $1,000,000, and an excess liability policy issued by Highlands, with a policy limit of $5,000,000. National Union had also issued an Owners' and Contractors' Protective policy to the City of New York. The City's policy insured its vicarious liability for the acts of Naclerio, and also against liability arising from its negligent supervision of the construction activity.

The tort suit against Naclerio and the City settled in 1989 before the jury's verdict on liability was returned. National Union contributed its Naclerio policy limits of $1,000,000 while Highlands contributed $1,100,000. The driver's automobile insurer contributed its policy limits of $60,000.

In 1990, Highlands sued National Union and two of its affiliated agents, American International Group and American International Adjustment Company, alleging that they withheld the existence of the OCP policy from Highlands during settlement negotiations.[1] As a result, Highlands argued, it paid funds from its excess policy in settling the Naclerio litigation that National Union should have paid from primary coverage. A jury returned a verdict for Highlands in 1992 for $1,100,000, finding that Highlands had proven fraud, negligent misrepresentation, and breach of fiduciary duty under New York law.

II.

National Union argues that no reasonable jury could have found[2] that Highlands justifiably relied on any fraudulent or negligent misrepresentation because Highlands had notice of the OCP policy. On April 10, 1986, National Union's broker sent a letter to National Union, on which the broker copied Highlands,

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[1]This opinion refers to the three defendants collectively as "National Union."

[2]*See Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

saying to "[b]e aware Nat'l Union also insured the City of N.Y. under OCP Policy #GLA169666." The broker copied Highlands again on May 27, 1986 with a second letter containing a similar warning. A some point, Highlands also received copies of the City's letter notifying National Union of the auto accident and National Union's reply, which both referenced the OCP policy.

Highlands counters by focusing on the context in which it sought information. With days to go before trial, a law firm that worked exclusively for National Union took over as the City's trial counsel from the City's in-house counsel.[3] Highlands' claims supervisor and Highlands' attorney called National Union to find out why this change occurred. They spoke to National Union's Naclerio file manager and his supervisor but neither called back with the requested information.[4] Highlands' supervisor also spoke to the new City counsel, who said he believed he was on the case because the City was an additional insured on the Naclerio policy.[5] In the absence of contrary indication from National

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[3]The City appears to have represented itself for most of the litigation, although lawyers employed by National Union answered for the City.

[4]Evidence showed that the two conferred and decided not to return Highlands' calls. The supervisor felt that the OCP policy did not cover the accident, and was concerned that revealing information about the OCP policy would breach a duty to the City.

[5]Testimony conflicted on this point. Highlands' claims supervisor remembered the lawyer making this statement, but the lawyer did not remember it.

Union, and wanting to act before the jury returned its verdict, Highlands settled the case on the assumption that Naclerio's policy was the only primary coverage available.

Highlands also pointed out that its file contained other information about National Union's coverage of the City. A report prepared by Naclerio's attorney indicated that the City was self-insured. The file also contained a November 17, 1987 letter from a National Union litigation manager indicating that "we do not insure the City of New York."[6] While conceding that it did not review its file before settling the case, Highlands argues that it would still have needed clarification had it done so.

These facts provide an adequate foundation on which to uphold the jury verdict. National Union correctly states that a line of New York cases holds that a plaintiff's reliance is not justifiable when it has the means to find the truth on its own,[7] as Highlands

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[6]Testimony also conflicted about the meaning of this letter. Because the letter only referenced National Union's Naclerio policy, it could be read as accurately saying that the City was not insured under that policy. On the other hand, it could be read as inaccurately stating that only the Naclerio policy was relevant to the case, particularly since the letter suggested that the author had the power to make decisions about the City's defense and was thus aware of the OCP policy.

[7]*See Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 737 (2d Cir. 1984) (buyer had unlimited access to seller's plants, personnel, and documents); *Marine Midland Bank v. Palm Beach Moorings, Inc.*, 403 N.Y.S.2d 15, 17 (N.Y. App. Div. 1978) (guarantor had "unlimited access to the relevant financial records" before guaranteeing note).

did here for some time before trial.[8] Those cases, however, involved arms' length transactions between plaintiff and defendant.[9] The key is that here, as a primary carrier, National Union owed Highlands the same fiduciary obligation it owed its insureds.[10] Under these circumstances, having told the defendants of its confusion and its need for a quick answer, Highlands could justifiably rely on them to clarify the situation.[11]

National Union urges that *Rotanelli v. Madden*[12] defines the insured-insured relationship differently. *Rotanelli* dismissed a claim against a representative of an insurance company for

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[8]Testimony indicated that data about insurance coverage was public information available from the broker who sold the policy.

[9]*See Leasco Corp. v. Taussig*, 473 F.2d 777, 783 (2d Cir. 1972); *Long Island Lighting Co. v. Transamerica Delaval, Inc.*, 646 F. Supp. 1442, 1452 (S.D.N.Y. 1986) (both holding that a plaintiff cannot sue for misrepresentations occurring after the defendant has made truthful representations, in arms-length transactions).

[10]*See Hartford Accident & Indemnity Co. v. Commercial Union Ins. Co.*, 772 F. Supp. 741, 743 (E.D.N.Y. 1991), *aff'd*, 962 F.2d 1 (2d Cir. 1992) (table); *Hartford Accident & Indemnity Co. v. Michigan Mutual Ins. Co.*, 463 N.E.2d 608, 610 (N.Y. 1984); *Zurich Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 524 N.Y.S.2d 202, 203 (N.Y. App. Div. 1988).

[11]*See Brown v. Lockwood*, 423 N.Y.S.2d 186, 193-94 (N.Y. App. Div. 1980) (noting that "a fiduciary or confidential relationship warrant[s] the trusting party to repose his confidence in the defendant"). *See also Benson v. RMJ Securities Corp.*, 683 F.Supp. 359, 377 (S.D.N.Y. 1988) (holding that "[r]eliance on the representations of fiduciaries would certainly be reasonable"). *See generally United States v. Chestman*, 947 F.2d 551, 568-69 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1759 (1992).

[12]569 N.Y.S.2d 187 (N.Y. App. Div. 1989).

negligently representing there was coverage, reasoning that an insured is presumed to have read its policy.[13] We read *Rotanelli* as applying the presumption that a person understands the contracts he executes.[14] That presumption does not extend to contracts executed by others and does not control this case.

The same analysis holds for negligent misrepresentation. As this court has recently noted, it is not clear that justifiable reliance is an element of negligent misrepresentation under New York law.[15] Whether it is, or whether New York employs a more flexible analysis focusing on the relationship between the parties, the standard is not more demanding than that for fraud, so our finding on the fraud issue disposes of this one as well.[16]

III.

National Union next attacks the jury's finding of a breach of fiduciary duty, arguing that no causal link connected any act by National Union to the money Highlands paid. We note initially that National Union enjoyed the benefit of an incorrect standard for causation. The jury was told that the measure of damages for

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[13]*Id.* at 188.

[14]*See Humble Oil & Ref. ;Co. v. Jaybert Esso Serv. Station*, 294 N.Y.S.2d 190, 192 (N.Y. App. Div. 1968) (cited by *Rotanelli*, 569 N.Y.S.2d at 188).

[15]*Thomas v. N.A. Chase Manhattan Bank*, 1 F.3d 320, 327 (5th Cir. 1993) (citing *White v. Guarente*, 401 N.Y.S.2d 474, 478 (N.Y. 1977)).

[16]*See id.*

breach of fiduciary duty was the difference between the amount Highlands paid in settlement and the amount they "would have paid" absent a breach of fiduciary duty. Under New York law, however, the question is not whether the plaintiff has shown but for causation,[17] but whether the plaintiff has satisfied a less demanding "substantial factor" standard.[18]

Regardless, there is sufficient evidence to sustain the verdict under either standard. When the case settled, the bifurcated trial had just finished the liability phase. The jury had announced, but not returned its verdict on liability. Highlands' representative testified that if he had known about the OCP policy at this point, he would have let the jury come back instead of settling. The argument continues that the risk of verdict would have been quite different with a second primary carrier at risk. If the City's share was large enough, Highlands' excess policy would be reached only at higher verdict levels or perhaps not at all. There is little question but that the jury could have found the City liable, and for the City's own negligence. That is, Highlands argues its exposure was much less than it thought--as a result of defendants' failure to disclose.

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[17] *Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537, 543 (2d Cir. 1994); *Northwestern Nat'l Ins. Co. v. Alberts*, 769 F. Supp. 498, 506 (S.D.N.Y. 1991).

[18] *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir. 1992).

National Union also argues that if it had disclosed before settlement, Highlands would still have paid the same amount of money because Naclerio, Highlands' insured, had a contractual obligation to indemnify the City for the City's losses. The evidence showed that Naclerio's obligation was limited to indemnifying the City for its vicarious liability for Naclerio's torts. Ample testimony addressed the distinction between vicarious liability and liability for the City's own negligence in supervising Naclerio, which fell outside Naclerio's indemnity obligation.

IV.

National Union next makes several challenges to the jury charge for the first time on appeal. In the context of Federal Rule of Criminal Procedure 52(b), the Supreme Court has recently announced that for an appellant in a criminal case to prevail with a new argument on appeal, he must show: (1) that an error occurred; (2) that the error was plain, which means clear or obvious; (3) the plain error must affect substantial rights; and (4) not correcting the error would "seriously affect the fairness, integrity or public reputation of judicial proceedings."[19] Federal Rule of Civil Procedure 51[20] is even more restrictive than

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[19]*United States v. Olano*, 113 S.Ct. 1770, 1779 (1993).

[20]Federal Rule of Civil Procedure 51 states: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."

Criminal Rule 52(b);[21] indeed, one circuit holds that it allows no new attacks on instructions on appeal.[22] We thus agree with the Sixth Circuit that "[t]he principles and decision enunciated in *Olano* apply *a fortiori* in the civil context where courts pay less strict attention to procedural protocol."[23] *Olano* augments this court's longstanding rule that reversal for plain error is "not a run-of-the-mill remedy" and will occur "only in exceptional circumstances to avoid a miscarriage of justice."[24]

Olano's requirement of an "obvious" error is stringent. The Court said that "at a minimum" an alleged error must be "clear under current law."[25] *United States v. Frady*,[26] an opinion cited by *Olano*, required error so clear that "the trial judge and prosecutor were derelict in countenancing it, even absent the

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[21]Federal Rule of Criminal Procedure 52(b) states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

[22]*Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir.) (declining to recognize a plain error exception in civil cases because of Rule 51's plain language), *cert. denied*, 112 S. Ct. 582 (1991). The language of Rule 51 offers powerful support for this view, but this panel is not free to adopt it. *Olano* pulls this circuit back from its drift from Rule 51, but it did not free this panel to follow the 9th Circuit.

[23]*Smith v. Gulf Oil Co.*, 995 F.2d 638, 646 (6th Cir. 1993).

[24]*Peveto v. Sears, Roebuck & Co.*, 807 F.2d 486, 489 (5th Cir. 1987).

[25]113 S. Ct. at 1777.

[26]456 U.S. 150 (1982).

defendant's timely assistance in detecting it."[27] It is the unusual case that will present such an error.

These claimed errors must meet all of the *Olano* elements. They meet none of them. We discuss them only to give guidance to the bar on what *Olano* requires, first observing that each are subtle legal arguments and emphasize isolated portions of the charge. There is nothing obvious about these errors so much co that a contrary contention borders on the frivolous.

Few jury charges in cases of complexity will not yield "error" if pored over, long after the fact in the quiet of the library -- if such an enterprise is to be allowed. It is not. The reality is that must such "errors" will be washed away if the trial court is given a fair opportunity to consider them. In short, so long as the trial judge gives counsel a fair opportunity to object, we will listen to unobjected to rulings only in those handful of cases that can meet the exacting requirements of plain error. *Olano* and Rule 51 do not interpose technical barriers or lay traps. These rules vindicate powerful interests in orderliness and finality. They also reflect the central order of the United States District Court. It is not a way station or entry gate. Rather, trials are the heart of the system. Trial, not appeal, is the main event. The rules we enforce today tether these statements to reality.

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[27] *Id.* at 163.

National Union first argues that the instructions fail to say that New York law requires proof of deceitful intent as an element of a claim for breach of fiduciary duty. The case on which it relies, *Horn v. 440 E. 57th Co.*,[28] does not support its argument. *Horn* found that the elements of a claim under the Martin Act, a New York securities law, paralleled the elements of negligent misrepresentation and breach of fiduciary duty because "both these causes of action omit the element of a deceitful intent."[29] It went on to dismiss the plaintiffs' common law claims as preempted because of their similarity to the statute, not because of any failure of proof on the part of the plaintiffs.[30] The correct statement of New York law is that a plaintiff alleging a breach of fiduciary duty can recover for loss "regardless of the existence of deceitful intent."[31]

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[28]547 N.Y.S.2d 1 (N.Y. App. Div. 1989).

[29]*Id.* at 120.

[30]*See id.* *See also id.* at 4 (assuming that the Martin Act did not forbid the defendants from making the representations on which the lawsuit focused). National Union also cites *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595 (2d Cir. 1991). *Flickinger* cites only *Horn* as authority for the proposition for that breach of fiduciary duty claims under New York law require proof of deceitful intent. *Id.* at 599. As that is not *Horn's* holding, we do not find *Flickinger* persuasive.

[31]*Eagle Tenants Corp. v. Fishbein*, 582 N.Y.S.2d 218, 219 (N.Y. App. Div. 1992). *See also Brown v. Lockwood*, 432 N.Y.S.2d 186, 193-94 (N.Y. App. Div. 1980).

National Union next argues that part of the fiduciary duty instruction presupposed National Union's liability and invaded the province of the jury. The contested part begins: "If you find that defendants' failure to provide Highlands with correct information . . ., your verdict will be for the plaintiff." The next sentence, however, gives the jury an alternative, stating that "if the correct information was provided to Highlands by defendants . . . or if defendants acted in good faith and in the exercise of honest discretion, you are to find for defendants." This instruction did not have a plainly erroneous tendency to confuse or mislead the jury.[32]

National Union finally complains that the fiduciary duty instruction allowed the jury to award damages without finding causation. The language it challenges reads: "If you find that there was damage to Highlands, your verdict will be for Highlands and in such an amount as you find to be actual pecuniary loss it suffered, that is . . . the amount of money Highlands would have paid had the defendants not breached their fiduciary duties to Highlands." The first sentence says that Highlands was damaged if "the amount of money it paid . . . is greater than the amount of money it would have paid if Highlands had been aware of the type and amount of insurance available to the city of New York."

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[32]*Wells v. Hico Indep. School Dist.*, 736 F.2d 243, 250 (5th Cir. 1984), *cert. dismissed*, 473 U.S. 901 (1985).

Reading these two sentences in conjunction, we find no plain error.[33]

V.

During closing arguments, the parties disagreed over whether the jury should consider the OCP policy limits. The district judge ruled that she would decide the OCP policy limits, and would grant a new trial if the verdict was inconsistent with her determination. She then instructed the jury to not determine the OCP policy limits. After the jury returned its verdict, the judge entered judgment without making a finding on policy limits.

National Union argues that the judgment should be reduced to $500,000 because the judge made an error of law in interpreting the contract. The argument is that this court should deem the judge to have found a $3,000,000 policy limit, the only limit suggested by the evidence that is consistent with the $1,100,000 verdict.[34] National Union then argues that the judge erred in making this finding because the $3,000,000 limit lapsed when the original contract term expired several days before the accident. The correct limit at the time of the accident, contends National Union, was $500,000, the limit in an endorsement the parties

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[33]*See id.*

[34]FED. R. CIV. P. 49(a).

executed when they agreed to extend the life of the original contract.

The flaw in National Union's argument is that it does not challenge the judge's legal conclusion about the proper interpretation of the contract, but rather challenges the judge's factual finding that the contract had two relevant endorsements rather than one.[35] Highlands points to a second endorsement, which took effect a few days after the first, that maintained the $3,000,000 policy limit for a short period that included the date of the accident. The parties adopted this endorsement, Highlands contends, because the City wanted to maintain $3,000,000 of coverage while shifting $2,500,000 to a different carrier. When the new carrier had difficulty preparing the policy on time, Highlands contends that the City came back to National Union and kept the original policy in force until the new one was ready. National Union contends that this endorsement was not signed and did not become part of the contract, while Highlands contends that industry practice was to only sign one copy of the endorsement. In other words, National Union attempts to challenge the judge's implicit factual finding that Highlands' witnesses about the effect of signatures were more credible and that the contract included the second endorsement.

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[35]22 John Alan Appleman et al., *Insurance Law & Practice* § 12851 (1979 & 1993 Supp.).

National Union waived this factual challenge. New York law places the burden on an insurer to prove the existence of limits on liability,[36] and National Union pled policy limits as an affirmative defense before the trial court. Despite having and recognizing this burden, National Union did not ask for an instruction on this defense, waiving its right to complain that the jury was not guided on it.[37] We will not now let National Union complain that the judge accepted the jury's verdict, when the jury could not have considered the argument with which National Union now attacks the verdict. Nor can National Union complain that the judge denied it a jury trial on this factual issue, because it had already waived that right. A judge is presumed to have made all fact findings necessary in favor of its judgment entered or a Rule 49 verdict. A part cannot complain that the fact issue ought to have gone to the jury unless it has requested their submission to the jury.[38]

VI.

National Union argues that the district court had no basis for awarding $133,185.17 in attorneys fees to Highlands. The

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[36]*See Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 632 F. Supp. 1213, 1223 (S.D.N.Y. 1986); *Emons Indus. v. Liberty Mut. Fire Ins. Co.*, 544 F. Supp. 185, 189 (S.D.N.Y. 1982).

[37]FED. R. CIV. P. 51.

[38]FED. R. CIV. P. 49.

court held that New York law allows recovery of attorneys fees when a suit seeks to overcome the consequences of fraud. Noting that "there is clear evidence supporting the jury's finding of fraudulent misrepresentation," it awarded the plaintiff its attorneys fees.

The district court erred. The New York rule is that counsel fees are incidents of litigation which a prevailing party may not collect unless an award is authorized by agreement between the parties, statute, or court rule.[39] No general exception to the "American Rule" exists for common law fraud.[40] The cases Highlands cite involve a statute allowing fee awards for fraudulent property transfers to defraud creditors.[41] Another says that where a defendant's fraud has caused a plaintiff to spend money defending other lawsuits, those legal expenses are compensable as damages.[42] None establish a general rule allowing recovery of fees for common law fraud.

AFFIRMED IN PART AND REVERSED IN PART.

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[39]*Cross v. Zyburo*, 587 N.Y.S.2d 670, 672 (N.Y.App. Div. 1992).

[40]*See id. See also* 60 N.Y. Jur. 2d, *Fraud and Deceit* § 244 (1992) ("The general rule that, in actions for torts, counsel fees and other expenses in conducting the suit cannot be taken into consideration in assessing damages, applies to actions for fraud and deceit.").

[41]*Fred v. Grabowsky*, 552 N.Y.S.2d 415, 416 (N.Y. App. Div. 1990); *Bagnall v. Dahajorn, Inc.*, 452 N.Y.S.2d 658, 659 (N.Y. App. Div. 1982) (both applying N.Y. Debt. & Cred. Law § 276-a).

[42]*Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co.*, 184 N.Y.S.2d 58 (N.Y. App. Div. 1959).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2933

HIGHLANDS INSURANCE COMPANY,

Plaintiff-Appellee,

versus

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, ET AL.,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(August 19, 1994)

Before GOLDBERG, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HIGHLANDS INSURANCE COMPANY	§	
Plaintiff,	§	
	§	
vs.	§	
	§	**CIVIL ACTION**
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; AMERICAN INTER-NATIONAL GROUP, INC. and AMERICAN INTER-NATIONAL ADJUSTMENT COMPANY,INC.	§	**NO. H-90-2959**
Defendants.	§	

AMENDED JUDGMENT

On the 25th day of August, 1992, came on for consideration the Plaintiff's Motion and Brief for Amended Judgment. The Court, after considering said Motion and Brief, the verdict of the Jury, including evidence on file in this case, is of the opinion and finds that an Amended Judgment should be entered for the Plaintiff, as follows:

1. Plaintiff should be awarded damages in the amount of $1,100,000;

2. Plaintiff should be awarded prejudgment interest on those damages in the amount of $285,361.61; calculated at the rate of 9% simple interest on the sum of $500,000 from the date that sum was paid, April 21, 1989; and an additional 9% on the amount of $600,000, from the date that amount was paid, January 30, 1990;

3. Postjudgment interest at the rate of 9% per annum, simple interest; and,

4. Costs of Court expended.

For the above sums, let execution issue if the same be not timely paid.

SIGNED this 25th day of August, 1992, at Houston, Texas.

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U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HIGHLANDS INSURANCE COMPANY	§	
Plaintiff,	§	
	§	
vs.	§	
	§	**CIVIL ACTION**
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; AMERICAN INTERNATIONAL GROUP, INC. and AMERICAN INTERNATIONAL ADJUSTMENT COMPANY,INC.	§	**NO. H-90-2959**
Defendants.	§	

ORDER

Pending before the Court in the above referenced cause in which New York law controls is prevailing Plaintiff Highlands Insurance Company's motion for Court to award attorney's fees (instrument #89). At a hearing on October 30, 1992 counsel stipulated that while the right to recover fees, costs, and expenses under New York law was contested, if the Court determined that these were recoverable, the parties agreed that the amounts set

forth in Plaintiff's application were correct, necessary, and reasonable. Specifically Plaintiff requests the following:

1.	Legal fees	$123,500.00
2.	Expenses	26,587.15
3.	Expert fees	38,710.05
4.	N.Y. counsel fees	9,685.17
5.	Deposition costs	5,967.92
TOTAL		$204,450.29

After reviewing the record and the applicable law, the Court concludes that the motion should be granted.

The American rule regarding fee shifting is that absent a contractual or statutory provision to the contrary, each party to a suit pays its own attorney's fees and costs. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 245, 247 (1975); *A.P. Ship Maintenance Corp. v. Lezak*, 511 N.Y.S.2d 216, 218 (N.Y. 1986). Plaintiff argues that New York recognizes two exceptions, both applicable here, to the rule: (1) when the opponent acts in bad faith, especially where there is an obligation to pay money, and continues to deny and conceal after its misconduct has been exposed, and (2) when the suit is to overcome

the consequences of fraud. In support of the first exception Plaintiff cites *Sierra Club v. United Army Corp. of Engineers*, 590 F. Supp. 1509 (S.D.N.Y. 1980), *Republic of Cape Verde v. A&A Partners*, 89 F.R.D. 14, 19 (S.D.N.Y. 1980), and *White v. Blue Cross & Blue Shield of Greater New York*, 549 N.Y.S.2d 598 (N.Y. Sup. Ct. 1989). For the fraud exception Plaintiff refers the Court to *Gantell v. Friedman*, 197 N.Y.S.2d 605 (N.Y. Sup. Ct. 1959), *Fread v. Grabowski*, 159 A.D.2d 550, 552 N.Y.S.2d 415 (N.Y. App. Div. 1990), and *Bagnall v. Daharjon, Inc.*, 89 A.D.2d 612, 452 N.Y.S. 2d 658 (N.Y. App. Div. 1982).[43] Plaintiff argues that the jury found Defendants' conduct in breaching its fiduciary duty and wrongfully denying its claim and in concealing information about an insurance policy and the type and amount of its coverage available to the City of New York to be in bad faith and to constitute common law fraud.

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[43] Although copies of additional cases were submitted by Defendants at the hearing, they were inapplicable to the situation here because the fee awards were based on statutes or rules or on common-law exceptions not relied upon by Plaintiff. One pertained to frivolous appeals. Accordingly the Court finds that they were not on point.

Referring to the Plaintiff's first three authorities, Defendants National Union Fire Insurance Company of Pittsburgh, Pennsylvania, American International Group, Inc., and American International Adjustment Company, Inc. contend that Plaintiff has misconstrued the bad faith exception, which applies only to a claim entirely without color and wantonly or vexatiously asserted for harassment, delay, or other oppressive purposes. Defendants insist such is not true of their defenses in this suit. They further urge that the fraud exception requires a simultaneous claim for punitive damages. At the hearing Defendants challenged recovery of expert fees as costs under New York law, but provided no authority for their stance.

Plaintiff responds that it is not seeking fees based on Defendants' conduct of this litigation but for their denial of claims and their coverups prior to litigation, as supported by *Sierra Club* and *Cape Verde*. Furthermore Defendants cite no authority for the proposition that the failure to request one type of relief, here punitive damages, when multiple kinds of relief are available,

precludes an award of attorney's fees. In *White*, Plaintiff argues, the Court determined that the defendants' fraudulent conduct warranted an award of both attorney's fees and punitive damages.

After reviewing the law cited in Plaintiff's brief, the Court concludes that an award of fees and costs is appropriate here on the basis of the fraud exception to the American rule.

Sierra Club and *Cape Verde* make clear that the bad faith exception applies to prelitigation, willful misconduct in the face of a plaintiff's obvious rights, as well as to that during pendency of a suit. 590 F. Supp. at 1513; 89 F.R.D. at 20-21. Moreover the Court concurs with the jury's finding of bad faith conduct by Defendants, which imposed on Plaintiff, despite its clear rights, the expenditure of time and money in this litigation. However, New York requires that there be clear evidence that Defendants' defenses are "entirely without color," as well as that they be made for reasons of harassment, delay or other improper purpose. *Sierra Club*, 590 F. Supp. at 1514, citing *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1088 (2d Cir.

1977). "A claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim." *Sierra Club*, 590 F. Supp. at 1514. Because these defenses might well have constituted the reason for prelitigation denial of Plaintiff's claim, this test should be applicable. No motion for summary judgment was filed by Plaintiff in this action, nor was there a directed verdict. This Court is hesitant to find that the defenses were entirely without color.

However, there is clear evidence supporting the jury's finding of fraudulent misrepresentation warranting an award of legal expenses. *See Gantell*, 197 N.Y.S. 2d 605; *Fread*, 552 N.Y.S.2d 415. The Court reads *White*, 549 N.Y.S. 598, as permitting recovery for attorney's fees in a breach of contract suit for public policy reasons when punitive damages are sought for morally reprehensible conduct directed toward the public, rather than merely a private injury. Significantly, the *White* court characterized the fees as a part of the punitive damages rather than

as a separate award. *Id.* It did not hold that a plaintiff must seek punitive damages as the sole means of obtaining legal expenses from the opponent.

Neither side has provided any authority on whether expert fees are included within costs in any insurance claim case rooted in the common law. The Court's own research leads it to conclude that the general rule barring taxation of expert witness fees beyond ordinary witness fees should apply here. *Allied Chemical Corp. v. Town of Geddes*, 386 N.Y.S.2d 810, 813-14 (N.Y. Sup. Ct. 1976). Accordingly, Plaintiff needs to make adjustments to its request in this category.

Conditioned upon the above modification, the Court **ORDERS** that Plaintiff's motion to award attorney's fees is GRANTED.

SIGNED this 11th day of November, 1992 at Houston, Texas.

MELINDA HARMON
UNITED STATES DISTRICT COURT